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No. 294

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IN THE

# Supreme Court of the United States

**October Term, 1958**

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JOHN E. STEINBECK,

*Appellant,*

—against—

LAWRENCE E. GEROSA as Comptroller of the City of New York, and GEORGE M. BRAGALINI as Treasurer of the City of New York,

*Appellees.*

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## JURISDICTIONAL STATEMENT

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LAWRENCE E. GEROSA, Comptroller of the City of New York, and GEORGE M. BRAGALINI, Treasurer of the City of New York,

*Appellees.*

---

## JURISDICTIONAL STATEMENT

Appellant appeals from an order and judgment of the Court of Appeals of the State of New York, made and entered on May 1, 1958, affirming an order of the Appellate Division (New York Supreme Court) which confirmed a determination of Appellee, Comptroller Gerosa, that Appellant, as an author, was liable for New York City's General Business and Financial Tax. This statement is submitted by Appellant to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## (a) Opinion Below

The opinion of the Court of Appeals is reported at 4 N. Y. 2d 302; 151 N. E. 2d 170, and a copy is appended to this statement (pp. 1a-21a, *infra*). The Appellate Division did not deliver any opinion (4 App. Div. 2d 855, 167 N. Y. S. 2d 429).

## (b) Statement of the Grounds Upon Which Jurisdiction Is Invoked

(i) Appellant instituted this proceeding in the Supreme Court, New York County, under Article 78 of the New York Civil Practice Act, to review the determination by Appellee Gerosa, that Appellant, as an author, was liable for New York City's General Business and Financial Tax (commonly known and herein called the "Gross Receipts Tax").

The proceeding was transferred to and heard initially by the Appellate Division, which on October 1, 1957, made its order confirming the Appellee's determination. Appeal was thereupon taken to the Court of Appeals of the State of New York as a matter of right, constitutional questions being involved (Civil Practice Act, Section 588).

(ii) The order and judgment of the Court of Appeals, which Appellant seeks to have reviewed here, was made and entered on May 1, 1958, and affirmed the order of the Appellate Division. Appellant's notice of Appeal from said order and judgment was filed on June 24, 1958 in the Supreme Court of the State of New York, in and for the County of New York.

(iii) Appellant believes and respectfully submits that jurisdiction to review said order and judgment by direct appeal is conferred upon the Supreme Court of the United States by Section 1257 (2) of Title 28 U. S. C.

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review such final order and judgment on direct appeal: *Winters* v. *New York,* 333 U. S. 507; *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U. S. 90; *Butler* v. *Michigan,* 352 U. S. 380.

**The Statute Involved**

(v) The Statute involved here, New York City General Business and Financial Tax, is imposed "for the privilege of carrying on or exercising for gain or profit within the city any trade, profession, vocation or commercial activity other than a financial business * * * "; the tax being imposed on gross receipts received in the city from such activities.

The text of the statute is set forth in Appendix C hereto (pp. 25a-30a).* (Local Laws of the Cities and Villages in the State of New York, 1942, p. 263.)

The Tax is reenacted periodically by Local Law of the City. Those applicable to the Appellant are Local Law 27, Local Laws of 1942, Local Law 21 (1943), Local Law 17 (1944), Local Law 19 (1945), Local Law 14 (1946) and Local Law 44 (1948).

In each, the Tax has been imposed in identical language, with the sole exception that the rate of taxation, fixed at 1/20th of 1% from 1942 through 1945, was increased to 1/10th of 1% by Local Law 14 (1946) and to 1/5th of

* References are to the Appendices to this Statement.

1% by Local Law 44 (1948). The current law was codified as Title RR of Chapter 41 New York City Administrative Code until 1948; since then it has been codified as Title B of Chapter 46 of said Administrative Code. Authority from the State to impose the tax is contained in Section 24(a) of the General City Law of New York.

## (c) The Questions Presented

The following questions are presented by this appeal:

(1) Is the New York City General Business and Financial Tax Law, when applied to Appellant, repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and therefore invalid, in that:

(a) The Law requires the payment of the tax "for the privilege of carrying on or exercising for gain or profit" in New York City, any activity from which receipts are derived; and has been judicially construed as a privilege tax in substance as well as form; and

(b) The activities which appellant exercised the "privilege of carrying on or exercising" in the City were: writing literary and dramatic works, and licensing or authorizing others to publish and perform such works; from which activities appellant derived all of his taxed receipts.

(2) Is the said law, when applied to Appellant, repugnant to Article 1, Section 8 of the Constitution of the United States of America, and therefore invalid, in that:

(a) Appellant exercised the privilege within the City of New York, of licensing or authorizing others

to sell copies of his works, and to perform them, in interstate and foreign commerce; and derived a portion of his taxed receipts from such interstate and foreign commerce; and

(b) The City of New York did not permit an allocation of such receipts, and the exclusion thereof from the tax.

## (d) Statement of the Case

The material facts are summarized in Chief Judge Conway's opinion: Appellant earns his livelihood as the author of novels, plays, motion pictures and other literary works (pp. 1a, 5a). His income is derived from moneys paid to him by persons to whom he licenses certain of the rights secured under the copyrights on his works; in the case of books payments are in the form of royalties; as to other works, they consist "of a lump sum or a percentage or a combination of the two". Appellant did not customarily sell his copyrights, but merely licensed particular rights to others (p. 2a). The licenses were negotiated by Appellant's literary agents, who were located in New York City, and whose principal function was to make these agreements (p. 1a). Although not mentioned in the opinion, these agents performed the same services for some 300 other authors (Transcript p. 107).

In 1952 Appellant filed tax returns for three periods of residence and paid the tax and interest thereon. The Comptroller (Appellee Gerosa) denied his request for refund, after an administrative hearing, following which the proceeding below was instituted in the New York Courts, to review that determination (p. 1a).

The Federal questions sought to be reviewed here were raised in the Appellant's pleading—the petition—which instituted the judicial proceeding (Transcript pp. 4, 8, 9) and in the briefs and oral arguments before the Appellate Division and the Court of Appeals.

The opinion of the New York Court of Appeals (pp. 8a-15a; 4 N. Y. 2d 302, pp. 311-320) establishes that the disposition made by the Court of Appeals is of a nature to bring this case within Section 1257 (2) Title 28 U. S. C., conferring jurisdiction on this Court.

### (e) The Federal Questions Are Substantial

(1) The nature of this case, and the rulings of the Court of Appeals, bring it within the provisions of Section 1257 (2), Title 28 U. S. C.; and within the cases cited above to sustain jurisdiction (p. 3, *supra*).

Appellant instituted this proceeding under Article 78 of the New York Civil Practice Act. In his petition, he sought an order annulling the Comptroller's determination that he was liable for the Gross Receipts Tax, pleading that the tax, when applied to him, infringed the First and Fourteenth Amendments, and Article 1, Section 8 of the United States Constitution.

These constitutional objections were met directly by the Court of Appeals, which said that "the principal question" was whether the First Amendment prohibited the City from imposing the tax on Appellant (p. 8a). After discussion of the constitutional question, the Court reached the specific conclusion that the statute, as applied, was not repugnant to the First and Fourteenth Amendments

(pp. 11a, 14a). That conclusion was the essential element in the Court's disposition of the case.

Similarly, the opinion below met and answered, on constitutional grounds, the question of whether the Commerce Clause prohibited the application of the tax to an author (pp. 16a-21a).

(2) Appellant respectfully submits that the questions presented are so substantial as to require for their resolution plenary consideration, with briefs on the merits, and oral argument.

Whether a state (or city) may impose a "literal" privilege tax—one which this Court and its Courts have held to be a privilege tax in substance as well as form—upon an author who earns his livelihood by exercising the right of free press, had not previously been decided by the highest court of a state.

In holding for the first time that such a tax could be levied on the privilege of being an author, the opinion below interpreted recent decisions of this Court in a manner that may well modify their effect if it stands unreviewed. (The opinion may also subject to this tax for the first time, not only authors residing in the City, but also many non-resident authors whose literary agents negotiate publishing agreements for them, and collect royalties, in New York.)

The Court of Appeals found that "uncertainty" existed concerning the "scope" of *Follett* v. *McCormick*, 321 U. S. 573; *Murdock* v. *Penn.*, 319 U. S. 105; and *Jones* v. *Opelika*, 319 U. S. 103. It concluded that restrictions on the states' power to tax the exercise of the First Amendment rights,

expressed in those opinions, had been impliedly rejected by subsequent decisions (*Tampa Times Co.* v. *City of Tampa,* 332 U. S. 749; *Corona Daily Independent et al.* v. *City of Corona,* 346 U. S. 833).

If this construction is correct—and we respectfully submit that it is not—then one of two inferences must be drawn. Either First Amendment rights are not entitled to a protection from state "privilege" taxation equivalent to that enjoyed by Interstate Commerce; or new meaning must be attributed, not only to *Murdock* and *Follett,* but also to analogous interstate commerce decisions, which struck down the New York City tax (or similar taxes), upon the same constitutional grounds urged by Appellant here and below (e.g., *Freeman* v. *Hewit,* 329 U. S. 249; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602; *Joseph* v. *Carter and Weekes Co.,* 330 U. S. 422.

One of those inferences is inevitable. The cited decisions held that the absence of discrimination, repressive intention, or like hostile factors, did not validate the application of this species of tax to the exercising of privileges secured by the Interstate Commerce Clause. In diametrical opposition, the Court of Appeals held that the absence of these factors sustained the same tax when applied to the exercising of privileges secured by the First Amendment.

Undoubtedly, the opinion below will be read for its constitutional consequences since it met the fundamental issues directly and did not dispose of them on non-constitutional grounds. Significantly, the Court of Appeals did not question either (a) that the tax was in substance, as well as in form, a privilege tax, or (b) that the privileges which Appellant exercised—and which were the taxable

"incidence"—were privileges secured by the free press clause of the First Amendment.

As to the nature of the tax, the Court declared that it was "expressly declared to be a privilege tax", citing *United Airlines* v. *Joseph*, 282 App. Div. 48, 121 N. Y. S. 2d 692; aff'd 307 N. Y. 762, 121 N. E. 2d 557, wherein the Appellate Division had declared that the gross receipts tax was a privilege tax "in form and in substance" (282 App. Div. at p. 55) and that it is

> "a tax for the privilege of doing business within the City of New York. It is not an income tax, an ad valorem property tax, nor is it a tax in lieu of other taxes for the use of facilities within the city"

(id., at p. 51).

Deliberately, and with an eye to *Spector Motor Service* v. *O'Connor* (340 U. S. 602, 605, 606), the New York courts established that the exercise of privileges was the "all important operating incidence" of the tax. (See also, *United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 683; aff'd 307 N. Y. 780, 121 N. E. 2d 617 cert. den. 348 U. S. 916).

Similarly, the constitutional issue was not blurred by any dispute as to the privileges which Appellant exercised. The opinion below makes it clear, as does the record, that the privilege of being an author in New York City was the "taxable incidence", and that the Appellant earned his livelihood solely by and as the result of his writing (pp. 1a, 5a). (He did not sell advertising, employ others or maintain a business establishment.) Indisputably, the First Amendment protects the privilege of engaging in those activities by which an author earns his livelihood:

i.e., writing novels and plays, and arranging by license for their publication, for profit (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501, 502; *Winters* v. *N. Y.*, 333 U. S. 507, 510; *Lovell* v. *Griffin*, 303 U. S. 444, 452). (Moreover, New York Courts, following *United Airlines* v. *Joseph, supra,* would be constrained to hold that the making of licenses for publication was "simply a continuous logical and necessary extension" of the protected privilege of writing for publication and profit (282 App. Div. at p. 56).)

Rather, the Court of Appeals held flatly that the City could select as the taxable "incidence", the exercise of the privilege of free press, as well as any other privilege. It resolved the conflict between this conclusion and the apparent restrictions on the state's power to tax such rights, expressed in *Murdock* and *Follett,* in the following manner (pp.10a, 11a):

> "In the course of the opinions in the Murdock and Follett cases the Court used broad language (relied on by petitioner Steinbeck) suggesting that license taxes may never be imposed for the exercise of constitutional privileges such as freedom of worship, speech and press. For example, it was said:
>
> 'Freedom of press, freedom of speech, freedom of religion are in a preferred position' (Murdock v. Pennsylvania, p. 115).
>
> '* * * a tax laid specifically on the exercise of those freedoms would be unconstitutional' (Murdock v. Pennsylvania, p. 108).
>
> 'The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is * * * obnoxious (Follett v. McCormick, p. 577).' "

Conceding that "such language has caused some uncertainty concerning the full scope of these three cases involving itinerant preachers," the Court of Appeals held that subsequent events made it clear that no "serious constitutional objection" existed to the gross receipts tax, citing *Tampa Times Co.* v. *City of Tampa,* 158 Fla. 595, 29 So. 2d 368, App. Dism. 332 U. S. 749, and *City of Corona* v. *Corona Daily Independent,* 115 Cal. App. 2d 382, 252 P. 2d 56, Cert. Den. 346 U. S. 833. These decisions, together with its analysis of *Grosjean* v. *American Press Co.,* 297 U. S. 233, convinced the Court of Appeals that the tax was constitutional in the absence of a showing that it actually curtailed "freedom to write or disseminate (his) writings," or that it was imposed for that purpose.

But there is nothing in these decisions to support such a conclusion. The state Courts in *City of Corona* and *Tampa Times* did not interpret the disputed taxes as privilege taxes in substance as well as in form. On the contrary, in language quoted by the New York Court of Appeals, the Supreme Court of Florida ruled that "in this case the City of Tampa has enacted a gross sales tax" (pp. 12a, 13a; 158 Fla. at 594) and the California Court took pains to explain that the tax was only "in form" a privilege tax (pp. 13a, 14; 115 Cal. App. 2d at 389).

And in *Grosjean,* this Court did not hold, expressly or by implication, that a "literal" privilege tax, applied to the right of free press, was constitutional in the absence of a showing of discrimination or oppression; these factors were emphasized in *Grosjean,* because they were present. There the privilege tax was not on its face imposed on the right of freedom of the press (nor on all privileges),

but ostensibly on the unprotected privilege of selling advertising. The analysis of its purpose and method of application was made to demonstrate that despite this apparently innocent "incidence", the tax was directed at the right of free press.

These decisions do not support the Court of Appeals' rationale precisely because they did not pass upon a privilege tax which expressly, and by judicial construction, was laid upon the exercise of all privileges, including those protected by the Constitution. In each, the state courts disclaimed any intention on the part of the State to actually tax privileges.

New York City's Gross Receipts Tax is, however, such a "literal" privilege tax—declared to be one in substance by its courts—and for this reason, and no other reason, it has been held unconstitutional when applied to taxpayers engaged in interstate commerce.

This Court has rejected as irrelevant all of the factors cited by the New York Court of Appeals in justification of the tax: neither innocence of intention, nor generality of application, nor lightness of burden on the constitutional privilege, nor modesty of rate, nor fairness of apportionment, nor even the paradox that the State could collect as much from the same taxpayer through a variety of other taxes, will permit it to impose on the constitutional privilege of interstate commerce, a tax which has in substance fixed, as the incidence of its application, the exercise of privileges (*Spector Motor Service* v. *O'Connor*, 340 U. S. 602, *Freeman* v. *Hewit*, 329 U. S. 249, *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422).

And, in *United Air Lines* v. *Joseph, supra*, Mr. Justice Breitel, commenting on *Puget Sound Stevedoring Co.* v. *State Tax Comm'n.*, 302 U. S. 90, and *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, said:

> "The local gross receipts taxes were struck down in each case merely because they were privilege taxes on interstate or foreign commerce. There was no claim of unfair burden or of discrimination, actual or potential. The holdings turned simply on the lack of power to tax locally interstate or foreign commerce. Nor did these cases turn on the threat of multiple tax burden, as that test had been developed finally in the *Western Live Stock* case, and the later case of the two was decided after the *Western Live Stock* case. * * * (See Gross Receipts Taxes: A Change in Doctrine, 56 Yale L. J. 898 et seq. (1947).) (282 App. Div. 56, 57)."

Thus protection of Interstate Commerce has not been conditioned upon a showing of abuse or immediate danger of restriction.

The opinion below merits full consideration because it denies to the right of Free Press equivalent, absolute protection against privilege taxation. This denial represents a reversal of fundamental principles enunciated by this Court. The Right of Free Press, is like Interstate Commerce, a "ward" of the Constitution and a "sensitive plant" (cf. *Freeman* v. *Hewitt, supra*). As Mr. Justice Brennan declared in *Roth* v. *United States*, 354 U. S. 476:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or

> by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests'' (at p. 488).

The door would be ''left ajar''—in fact opened— if the states' power to impose a ''literal'' privilege tax were expanded to include privileges secured by the First Amendment. Because the risk of deterrence is inherent in such a tax (and in conceding the States' claim of its unlimited scope), the door has been ''kept tightly closed'' in the area of interstate commerce.

There, the Court has eschewed ''practical'' judgments in which the effects of the tax on commerce were measured or weighed to determine constitutionality, because this would initiate the process of ''erosion''; the extent to which deterrent effect is accomplished cannot be precisely calculated (*Freeman* v. *Hewitt*, 329 U. S. 249, 253, 256). It is equally impossible to apply precise weights and measurements to the right of Free Press.

Once the state is permitted to select the exercise of the constitutional right as the ''incidence'' of taxation, the difficulty of drawing distinctions vitiates protection. At what point the increasing rates of the Gross Receipts Tax would burden the exercise of an author's right of Free Press—2%, 5%, 10%—would pose a nice question; particularly since the tax is measured by gross receipts and does not mitigate its impact on the collection, in one year, of the fruits of several years of writing, as does Section 1302, Internal Revenue Code. (Conceivably, the present rate of taxation was one factor which impelled the conclusion that no oppressive effect was established as a ''practical'' mat-

ter; the same rate, however, was applied in *United Air Lines* v. *Joseph* (*supra*) and *Joseph* v. *Carter & Weekes Co.* (*supra*).)

The process of "erosion" is also inevitable when the state is free to determine if the privilege of Free Press is one of those sturdy enough to bear a direct tax. It has already made a discriminating judgment in this regard, adverse to this constitutional privilege. It exempts from the tax a vast majority of New York residents—those who exercise all privileges covered by the tax, but do so as employees; it has also excluded a miscellany of other privileges (26a, 27a). It has not exempted Freedom of Press, Speech or Religion.

But even if the tax were truly general in application, that would not save its constitutionality in the case of interstate commerce, and should not do so when it is applied to the right of Free Press. That right is entitled to a greater protection against the State's judgment as to the direct tax burden it can bear than the consolation that it shares (or would share) it undiscriminatingly, with all other privileges that are not secured by the Constitution and are controllable by the State (cf. *Freeman* v. *Hewit*, 329 U. S. 249, 252; *Murdock* v. *Penn.*, 319 U. S. 105, 115).

The price paid by the states, in loss of tax revenue, for supporting the complete immunization of constitutional rights from privilege taxation is not significant enough to require any compromise. Concerning taxation of interstate commerce, this Court has emphasized that "revenue serves as well no matter what its source" and has indicated the variety of taxes which a State is free to impose as productively, and which reach the same taxpayers without constitutional objection (*Freeman* v. *Hewit*, 329 U. S.

249, 253, 254-256). The same balance of values exists in the case of Freedom of the Press. The revenue lost by exempting the right from the Gross Receipts Tax would be much smaller than the loss sustained in the case of interstate commerce; and denial of the power to reach the right by privilege taxation does not prevent the State (or City) from reaching authors or ministers by a variety of equally productive taxes (*Follett* v. *McCormick*, 321 U. S. 573, 527-528; *Murdock* v. *Penn.*, 319 U. S. 105, 112).

If a state elects (for reasons of political expediency or otherwise) to impose a "literal" privilege tax rather than an income, or property, or other tax, it can afford to exempt those privileges granted and protected by the Constitution.

The second question involved also merits plenary consideration. Appellant contends that the tax, having been levied upon him without allocation between royalties derived from interstate and intrastate commerce, is repugnant to the Commerce Clause of the Constitution. Unless such an allocation is permitted, the tax is exacted, in part, for the privilege of licensing rights to sell and perform Appellant's writings and plays both in interstate and foreign commerce. These licenses are essential to (in fact, the very fountainhead of) that commerce (*Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, *Puget Sound Stevedoring Co.* v. *State Tax Comm'n.*, 302 U. S. 90).

The adverse determination of this issue reflects a narrow construction of these decisions. The purely localized intrastate activity of loading a ship is immune from a privilege tax because essentially related to the subsequent interstate commerce engaged in by the vessel. But the nexus between Appellant as a copyright proprietor, and

the subsequent interstate sale of copies of works published and sold by grace of his license, and protected during such commerce by the copyright he retains, is much more essential, and is a continuing relationship. The State's power to tax the privilege of making and performing licenses which initiate and protect interstate and foreign commerce has never been conclusively determined.

Respectfully submitted,

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# Appendix A

## Opinion of the Court of Appeals of the State of New York

In the Matter of JOHN E. STEINBECK, Appellant v. LAWRENCE E. GEROSA, as Comptroller of the City of New York, et al., Respondents.

* * * * *

Chief Judge CONWAY. Petitioner is an author of novels, plays, motion picture scripts, magazine articles and other literary works. In April of 1952 he filed returns under the New York City General Business and Financial Tax Law (commonly known and hereinafter referred to as the "Gross Receipts Tax") covering the following periods: January 12, 1943 to December 31, 1944; October 1, 1945 to August 30, 1948; January 1, 1950 to June 30, 1950, and paid the tax and interest thereon. The comptroller denied a refund following which the present proceeding was instituted to review that determination. Thereafter, the parties stipulated that the total amount paid represented, in part, taxes and interest attributable to literary works of petitioner prior to the time he became a resident of New York City. They further stipulated that the city would pay petitioner the sum of $251.24 and that in the event the petitioner were fully successful in this proceeding the refund will be limited to the sum of $531.09 principal of tax and $133.73 interest or a total of $664.82.

It is conceded that petitioner was a resident of New York City and wrote numerous novels, motion picture scripts, plays, newspaper and magazine articles and radio

scripts during the three periods here involved. Through his literary agents located in New York City, petitioner negotiated for the licensing of certain rights in his literary works. The agents' principal function was to negotiate such contracts for Mr. Steinbeck and they had complete authority and discretion, in so doing. Indeed, they even executed contracts on his behalf. Certain of the author's rights were licensed by the agents orally as "a cash deal". He did not sell the copyright to his works. He merely licensed certain rights in them to others.

Respondents' Exhibits D, H and I are examples of the type of contract executed by petitioner in New York City. They purport to grant certain of his rights in his literary works. As to books, the consideration to be paid to him consists of a percentage of the amount charged by the publisher for all copies sold, less copies returned, but with "no deduction for cash discounts or bad debts". This percentage is characterized as "royalties". As to motion picture scripts, magazine and newspaper articles, and plays, the consideration consists of a lump sum or a percentage or a combination of the two. The agents would receive the royalty moneys, take their commission and deposit the balance in Mr. Steinbeck's bank account.

The Gross Receipts Tax (Administrative Code of City of New York, ch. 46, tit. B) is imposed pursuant to section 24-a of the General City Law which authorizes New York City to impose "a tax * * * upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity * * * or making sales within such city". The tax is to be "meas-

ured by the gross receipts from such activities carried on or sales made within the city * * *."

In his petition Steinbeck alleged that the tax levied on him, and paid under protest, was collected erroneously, illegally and unconstitutionally because

(a) his activities in New York City did not constitute a trade, business or other activity within the meaning of the tax statute;

(b) the Gross Receipts Tax is a tax on privileges secured by the First and Fourteenth Amendments to the Constitution of the United States and section 8 of article I of the Constitution of the State of New York;

(c) his activities in New York City other than writing were *de minimis* and not subject to tax; and

(d) the tax was levied, in part, on royalties derived from interstate and foreign commerce, in violation of section 8 of article I of the United States Constitution.

The Gross Receipts Tax applies to persons "carrying on or exercising for gain or profit within * * * [the city of New York] any trade, business, profession, vocation or commercial activity * * *" so long as the gross receipts therefrom exceed $10,000 per annum (Administrative Code, §B46-2.0). Insofar as the interpretation of a statute is concerned there are four kinds of terms or words, to wit, common, technical, legal, and trade or commercial (2 Sutherland on Statutory Construction [3d ed.], §4919). Manifestly, the words found in the Gross Receipts Tax are common words. Moreover, it is well settled that a "tax

law should be interpreted as the ordinary person reading it would interpret it." (*Howitt* v. *Street & Smith Pub.*, 276 N. Y. 345, 351; *Matter of Business Statistics Organization* v. *Joseph*, 299 N. Y. 443, 449.) Common words are to be given their commonly understood meaning unless another meaning is obviously intended (see McKinney's Cons. Laws of N. Y., Book 1, Statutes, §232). Since there is nothing in the Gross Receipts Tax to suggest—even remotely—that the lawmakers intended to confer a special or restricted meaning on the terms therein used, we may look to the legal dictionaries for the generally accepted common definition of such terms. The word "trade" has the broad definition of "Any sort of dealings by way of sale or exchange; commerce, traffic." (Bouvier's Law Dictionary [8th ed.], Vol. III, pp. 3290-3291.) "Business" has been described as a word of "large * * * import", a "very comprehensive term". It encompasses "That which occupies the time, attention and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed". (Bouvier's Law Dictionary [8th ed.], Vol. I, p. 406; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171.) "Profession" has been defined as a "vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual." (Black's Law Dictionary [4th ed.], p. 1375.) A "vocation" is "One's regular calling or business."—"The activity on which one spends major portion

of his time and out of which he makes his living." (Id., p. 1745.) "Commercial activity", of course, is activity relating to or connected with trade and traffic or commerce in general. (See Black's Law Dictionary [4th ed.], p. 337.) Thus, it will be seen that the broadest of terms have been employed in the Gross Receipts Tax. Indeed, it is difficult to conceive of a more all-embracing tax. The sweep of the statute is so great that it was deemed necessary to provide expressly that the phrase, exercising any profession, vocation, trade, business or commercial activity, "[d]oes not include labor or services rendered by an individual for a wage or salary." (Administrative Code, §B46-1.0, subd. 5.)

Petitioner Steinbeck earns his livelihood as an author, reaping profits from the sale of his literary endeavors. It cannot be doubted that in so doing petitioner is carrying on or exercising for gain or profit a trade, business, profession, vocation or commercial activity as those terms are commonly understood.

In an effort to demonstrate that he is not engaged in "business", the petitioner cites *People ex rel. Nauss* v. *Graves* (283 N. Y. 383). The question there presented was whether the owners in common of certain realty were engaged in business within the meaning of article 16-A of the Tax Law which imposed a "Temporary emergency tax on net incomes of unincorporated businesses." The relators had inherited the subject real estate and had engaged another to manage it. After pointing out that the term "business" is of very broad significance and has a great variety of meanings this court wrote (pp. 386-388): "When

used in tax statutes similar to that involved in the case at bar, 'business' or 'doing business' connote something more than the ownership of property and the receipt of income derived from property. [Cases cited.] Although the very nature of the case does not permit an exact formula by which to determine when the activities of a property owner amount to the doing of business, there has been evolved the principle which distinguishes between a passive and an active owner or investor. One who allocates the active administration of the properties to others and himself performs only such acts as are appropriate to safeguard his ownership is to be distinguished from one who himself actively participates in administering the management of the properties. The question is one which depends upon the facts of the particular case. [Case cited.] * * * If the activities of these appellants were deemed to be the doing of business then the doing of business would comprise every instance where property is owned in common and the owners act but to safeguard their property. If there is to be maintained a distinction between ownership on the one hand and the doing of business on the other, a distinction established by the cases, and respondents do not suggest that the distinction be obliterated, then these appellants may not be regarded as having been engaged in the doing of business."

The *Nauss* case (*supra*) is not controlling for at least two reasons. First Mr. Steinbeck is not a mere passive owner or investor. He actively creates the literary properties which bear his name. Second, and more important, or so it seems to us, the statute presently under considera-

tion is considerably broader in its terms than the statute in the *Nauss* case. The only word in issue in the *Nauss* case was "business" as it appeared in the context of an unincorporated business tax statute. The issue in this case is not only whether petitioner is engaged in any "business" as that word appears in the context of a gross receipts tax statute, but also whether he is engaged in any "trade", "vocation", "profession" or "commercial activity" as those words appear in the context of such a statute—a statute which was intended to be so broad in its operation that the lawmakers felt obliged to declare that the statute "[d]oes not include labor or services rendered by an individual for a wage or salary." (Administrative Code, §B46-1.0 subd. 5.)

Petitioner emphasizes that his receipts in any one taxable calendar year are attributable to contracts made in prior taxable years. The intimation is that these receipts were not taxable at all. Petitioner bases his argument on the wording of the statute which measures the tax by the "receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year" in which the privilege period commences (Administrative Code, §B46-2.0, subd. a). Petitioner urges that in order for the receipts to be taxable in any calendar year they must not only be received in that year but they must be derived from a "particular activity" carried on in that year. By "particular activity", petitioner seems to refer to the making of the contract which gave rise to the receipts. The statute, however, merely requires that the

receipts be attributable to the profession, vocation, trade, business, or commercial activity which the petitioner carried on in that year and not to any "particular activity." The receipt of income is as much a part of a business as the making of a contract that gives rise to such income.

That brings us to the principal question in the case, which is, "Does the constitutional guarantee of freedom of the press prohibit the City of New York from imposing a gross receipts tax on the receipts of an author derived from the grant of licenses to his rights in his literary works?"

The Gross Receipts Tax is expressly declared to be a privilege tax (Administrative Code, ch. 46, tit. B; *Matter of United Air Lines* v. *Joseph*, 282 App. Div. 48, 55, affd. 307 N. Y. 762). Petitioner does not contend that he is exempt from the general run of taxes. His contention is that his activities as an author are exempt from this form of taxation and that a privilege tax levied upon his activities impinges on the right of free press reserved to him by the United States and New York Constitutions and, so, is totally invalid. To sustain his position he refers us to the cases of *Grosjean* v. *American Press Co.* (297 U. S. 233 [1936]); *Follett* v. *McCormick* (321 U. S. 573 [1944]); *Murdock* v. *Pennsylvania* (319 U. S. 105 [1943]), and *Jones* v. *Opelika* (319 U. S. 103 [1943]).

The Supreme Court of New Jersey has aptly summarized the *Grosjean* case (*supra*) in these words: "In the *Grosjean* case * * * the court dealt with an infamous attempt to control Louisiana newspapers by the imposition of a gross receipts license tax on newspapers having a circu-

lation of more than 20,000 copies per week. [There were 13 newspapers in Louisiana which had a circulation of more than 20,000 copies per week. There were 4 other daily newspapers each having a circulation of "slightly" less than 20,000 copies per week which were in competition with the larger newspapers and 120 weekly newspapers also in competition "to a greater or lesser degree" with the larger daily newspapers.] The court struck it down stating that although newspapers were not immune from ordinary forms of taxation, this was 'not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.'" (*City of Absecon* v. *Vettese*, 13 N. J. 581, 585-586.) In writing the opinion of this court in *Matter of Business Statistics* v. *Joseph* (299 N. Y. 443, 453, *supra*), I made a comment similar to that of the New Jersey court concerning the *Grosjean* case, to wit, "There, as stated in *Mabee* v. *White Plains Pub. Co.* (327 U. S. 178, 184) '* * * the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation.'" The inapplicability of the *Grosjean* case to the present case is best illustrated, however, by the following language from the Supreme Court opinion in that case:

"* * * The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.

*Appendix A—Opinion of the Court of Appeals of the State of New York*

"* * * The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers. * * *"(297 U. S. 250-251.)

In the *Murdock, Jones* and *Follett* cases (*supra*) the Supreme Court of the United States held that a municipal ordinance which, as construed and applied, required religious colporteurs to pay a license tax as a condition to the pursuit of their activities, was invalid under the Federal Constitution as a denial of freedom of speech, press and religion. In the course of the opinions in the *Murdock* and *Follett* cases the court used broad language (relied on by petitioner Steinbeck) suggesting that license taxes may never be imposed for the exercise of constitutional privileges such as freedom of worship, speech and press. For example, it was said:

"Freedom of press, freedom of speech, freedom of religion are in a preferred position" (*Murdock* v. *Pennsylvania, supra* p. 115).

"* * * a tax laid specifically on the exercise of those freedoms would be unconstitutional" (*Murdock* v. *Pennsylvania, supra,* p. 108).

"The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is * * * obnoxious" (*Follett* v. *McCormick, supra,* p. 577).

While such language has caused some uncertainty concerning the full scope of those three cases involving itinerant preachers, it seems clear from subsequent events that there is no serious constitutional objection to a tax law such as the New York City Gross Receipts Tax. In *Tampa Times Co.* v. *City of Tampa* (158 Fla. 589) the Supreme Court of Florida upheld a privilege tax, measured by gross receipts, on all wholesale and retail sellers of newspapers, magazines and periodicals published within the city of Tampa. Appeals taken to the Supreme Court were "dismissed for want of a substantial federal question." (332 U. S. 749 [1947].) We are told that a dismissal "for the want of a substantial federal question", as distinguished from a denial of certiorari, is a decision on the merits and has the force of precedent (Frankfurter and Hart, The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 77).

Much that was said by the Supreme Court of Florida in the *Tampa Times* case (*supra*) bears repetition here. We will content ourselves with the following excerpts (158 Fla. 529-594):

"The ordinance in question is for revenue. There is no claim that it is arbitrary or harsh in nature. The single question then is whether a newspaper is immune from the burden of taxation to maintain government. • • •

"Freedom of the press is almost as old as printing. It, like its older brother freedom of speech, is indispensable to free government. We cannot circumscribe or define it, yet great scholars and jurists have filled libraries with dissertations thereon. Freedom of the press is, in truth, an

ideal to which all lovers of liberty may strive in order to maintain free government in an ever changing society. Its importance cannot be magnified too much. It is not enough to say that freedom of the press is a cornerstone of free government. *It is, in fact, a prerequisite to free government.* Yet, in view of all that, it is no governmental functionary. It exercises no governmental power • • • neither does it interpret, administer or enforce any although it may wield a great influence on all. It is clothed with no power to rule, yet it is and must remain a free institution. The press renders a public service although it is a private business which can only endure under the protection of free government. It may invoke constitutional protection in common with others. Government possesses power whereas the press wields influence. A free government and a free press are essential for either to survive. Government is charged with the duty of protecting the rights and liberties of all its citizens including 'the press.'

"A government must have revenue. It is not a producer. Its income must be derived by taxation in one form or another. Admittedly a tax, in any form or guise, is a burden yet that alone does not impair freedom of the press any more than an income or ad valorem tax will destroy freedom of speech to any other citizen. Many states rely entirely on ad valorem taxes for revenue. We have no knowledge of any case where a newspaper has been held immune from all forms of taxation. A state may choose to substitute a gross sales tax but in that case the relative burden on a newspaper would not be changed. In this case

the City of Tampa has enacted a gross sales tax. Its application is general. The tax enacted is reasonable and its terms are not arbitrary."

In *City of Corona* v. *Corona Daily Independent* (115 Cal. App. 2d 382) the District Court of Appeal, Fourth District, California, upheld a flat license tax imposed by ordinance upon the doing of business within the city, including that of publishing a newspaper. After considering the *Murdock* case and other pertinent authorities, that court concluded that there was no constitutional inhibition against the tax. Among other things, that court wrote:

"The phrase 'power to tax is the power to destroy' is without application to the issue here presented. There is no allegation or showing by defendant that the amount levied was arbitrary or harsh in nature, or oppressive or confiscatory, or that defendant's freedom to disseminate news and comment has been actually curtailed or abridged by the requirement that it shall pay a tax of $8.00 per quarter for publishing its newspaper. Nor is there any showing that the imposition of the tax was for the purpose of regulating defendant's business.

"While the ordinary business tax here in issue is levied in form upon the privilege of engaging in or transacting business, it is, on its face and in fact, a tax for revenue purposes only, and does not grant or take away any right to do business, does not subject business to withdrawal or control by the city, is not regulatory in any manner, and in substance has been recognized and upheld by the weight of authority.

"We conclude that a nondiscriminatory tax, levied upon the doing of business, for the sole purpose of maintaining the municipal government, without whose municipal services and protection the press could neither exist nor function, must be sustained as being within the purview and necessary implications of the Constitution and its admendments." (115 Cal. App. 2d 389-390.)

The Supreme Court of the United States denied certiorari (346 U. S. 833). Justices BLACK and DOUGLAS dissenting, stating, *inter alia*, that "The license tax involved here is a privilege tax in fact as well as in form—' a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.' (319 U. S. at p. 113.) No government can exact a price for the exercise of a privilege which the Constitution guarantees."

In the light of all the foregoing, we are persuaded that the City of New York may constitutionally impose the Gross Receipts Tax upon petitioner Steinbeck. The tax applies not only to writers and publishers but to all businesses, professions, trades, vocations and commercial activities. It is measured by gross receipts and applies to all without discrimination. No tax is due and no return need be filed unless and until the gross receipts exceed $10,000 per annum. Thus, it is a general tax and one which is not, in any sense, aimed at the press or at writers. The city does not seek, through the guise of the Gross Receipts Tax, to regulate those covered by its provisions or, more particularly, to restrain or interfere with freedom of the press. Its sole object is revenue notwithstanding the fact that the

tax is styled a "privilege tax." The Gross Receipts Tax is, like any tax, a burden. Nevertheless, it does not impair Mr. Steinbeck's right of freedom of the press any more than an income tax impairs such right. "The guaranties of the Constitution and Bill of Rights in favor of the freedom of the press, freedom of speech, and personal liberty, were never intended to restrict the right of taxation for the support of the government. If these guaranties did restrict the power of taxation, the government would soon be insolvent, and powerless to furnish the protection claimed." (*City of Norfolk* v. *Norfolk Landmark Pub. Co.*, 95 Va. 564, 565.)

There is no claim and no showing by petitioner that the amount levied was arbitrary or harsh in nature, or oppressive or confiscatory, or that his freedom to write or disseminate his writings has been actually curtailed by the tax. What is more, petitioner has failed to demonstrate that the tax was imposed for the purpose of regulating his writing.

Petitioner next asserts that he is entitled to an allocation of tax even if the tax as applied to him is constitutionally valid. He contends that an allocation is required because part of the activity which gives rise to his receipts consists of the exercise of a constitutionally protected privilege, viz., "the creative activity of writing". Petitioner maintains that the "City must provide a basis for allocating to the creative activity of writing, constitutionally protected, a reasonable porion of the royalties earned by the appellant." There is no merit to this argument which, it will be observed, is, in reality, but a restatement of his

principal argument that a privilege tax cannot be levied upon a writer at all. If petitioner were correct, it would be difficult to conceive of any business which would not be entitled to a similar allocation, since hardly any business can be carried on without speech or writing. However, no such suggestion is to found in any of the cases. Indeed, the decisions involving the application of a privilege tax to newspapers stand for the proposition that the exercise of freedom of the press does not grant immunity from general taxation, not for the proposition that only selected incidents unconnected with such exercise may be taxed. The totality is subject to tax.

Mr. Steinbeck's final contention is that even if he is not totally exempt from the privilege tax, the city cannot reach royalties paid to him for his consent to sales and performances of his work in interstate and foreign commerce. The claim is that the grant of consent—the license to publish—constituted the commencement of or induced interstate commerce.

The contracts for licenses of petitioner's rights in his novels, plays and motion picture scripts call for the payment of a lump sum or a percentage or a combination of the two. The percentage payment, commonly referred to as "royalties", is made by the publisher on the basis of the number of copies that the publisher has sold. While many of the sales may have been made by the publisher in other States and other countries, and it may be that the publisher was engaged in interstate and foreign commerce as a result, it does not necessarily follow that petitioner was likewise engaged in interstate and foreign commerce. The

relationship between Mr. Steinbeck and his publishers was that of debtor and creditor—not that of joint venturers (cf. *Broadcast Music* v. *Taylor,* 10 Misc. 2d 9). Petitioner received no property rights in the books or magazines sold by the publishers nor in the films made by the motion picture companies. It is true that the word "royalty" is defined generally as a share of the profits reserved to the owner for permitting another to use his property (see 77 C. J. S., Royalty or Royalties, pp. 542-543) and that the sharing of profits is an element of a joint venture arrangement. However, there was to be no sharing of losses. For example, petitioner was to receive a percentage of the amount charged by the publisher for all copies sold, less copies returned, but with "no deduction for cash discounts or bad debts." An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses.* (*Reynolds* v. *Searle,* 186 App. Div. 202, 203.) An agreement to distribute the proceeds of an enterprise upon a percentage basis does not give rise to a joint venture if the enterprise does not represent a joinder of property, skills and risks (*Gordon Co.* v. *Garcia Sugars Corp.,* 241 App. Div. 155). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit * * *." (*Hasday* v.

*Barocas,* 10 Misc. 2d 22, 28.) The present case does not reveal such an amalgam of property or interests as would create a joint venture. No one can deny that petitioner and the publishers had a community of interest and a common economic objective. However that may be, it is not "enough that two parties have agreed together to act in concert to achieve some stated economic objective. Such agreement, by itself, creates no more than a contractual obligation, otherwise every stockholders' agreement would give rise to a joint venture. The fiduciary obligation arises upon the coagulation of property, profits or other interests which the parties can then be said to hold jointly and which are made accessible to each other in terms of the confidential relationship which exists between joint associates." (Id., pp. 28-29.)

The sums payable to petitioner by way of royalties were merely the price for the licensing of certain of his literary rights. The sales made by the publishers and the gross receipts from the motion pictures were simply the means by which the price for the licensing of Mr. Steinbeck's literary rights were ultimately to be determined. The relationship between an author and a publisher is not that of joint venturers merely because the publisher is to pay the author on the basis of receipts from the sale of books. On the contrary, it must be said that the *source* of Mr. Steinbeck's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City (see *Ingram* v. *Bowers,* 57 F. 2d 65).

Petitioner makes the further argument that his activities are so closely related to interstate commerce and foreign

commerce that they must be treated as though they were activities in interstate or foreign commerce.

The commerce clause of the Constitution of the United States (U. S. Const., art. I, § 8) expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the States and with foreign nations. Foreign commerce, as well as interstate commerce, is governed by the commerce clause, and the same principles govern both (*Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 425). The purpose of the commerce clause is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile State laws, and to insure uniformity in regulation (11 Am. Jur., Commerce, § 2). Although the term "commerce" is employed in the Constitution it is not defined therein and it has been said that the term is not susceptible of exact and comprehensive definition (id., § 3). However, it is no longer open to question that the formation of a contract between persons in different States is not within the protection of the commerce clause unless the *performance* thereof is within its protection (*Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 253; see, also, *Matter of New Yorker Mag.* v. *Gerosa*, 3 N. Y. 2d 362, appeal dismissed by the Supreme Court of the United States on April 28, 1958, 356 U. S. 339). "Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation is induced or occasioned by the business." (*Western Live Stock* v. *Bureau of Revenue, supra*, p. 253.) In *Ficklen* v. *Shelby County Taxing Dist.* (145

U. S. 1, 24) the Supreme Court of the United States sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within the State of Tennessee for sellers without the State. In so doing, the court said: "This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce." In our judgment, the quoted language from the foregoing cases is applicable here. The writing by Mr. Steinbeck of books, plays, magazine articles, motion picture scripts and radio scripts, and the granting, within the city of New York, of licenses to certain of the rights therein is separate and distinct from the subsequent sale by others of books, magazines, etc., in interstate or foreign commerce even though the granting of the licenses may induce or occasion interstate commerce. The most Mr. Steinbeck can claim is that his receipts, insofar as their measure was based on the amount of subsequent interstate or foreign sales by other persons of books published by such other persons, are traceable to such interstate or foreign sales. That does not bring him within the coverage of the commerce clause. In the *Western Live Stock* case (303 U. S. 250, *supra*) the Supreme Court noted, as one reason for upholding the statute there under consideration, that a tax on the taxpayer's activity could not be levied elsewhere than in New Mexico where the taxpayer prepared, printed and published a magazine (the magazine was circulated within and without the State of New Mexico). Here, as in that case, a tax on Mr. Steinbeck's activities cannot be

levied elsewhere than in New York. In the words of the *Ficklen* case (145 U. S. 1, 24 *supra*), "This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."

The order of the Appellate Division should be affirmed, with costs.

Judges DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS and BURKE concur.

Order affirmed.

## Appendix B

### The Order Appealed From

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of May in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,

*Chief Judge, Presiding.*

RAYMOND J. CANNON, Clerk.

Remittitur May 1, 1958.

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In the Matter of the Application of

John E. Steinbeck,

Appellant,

vs.

Lawrence E. Gerosa, as Comptroller of the City of New York, & ano., &c.,

Respondents,

for a Review &c.

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BE IT REMEMBERED, That on the 22nd day of January in the year of our Lord one thousand nine hundred and

fifty-eight, John E. Steinbeck, the appellant in this cause, came here unto the Court of Appeals, by Hays, St. John, Abramson & Heilbron, and Stern & Reubens, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Lawrence E. Gerosa, as Comptroller of the City of New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Irwin Karp, of counsel for the appellant, and by Mr. Isidore Friedman, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State

of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of
the State of New York

Court of Appeals, Clerk's Office.
Albany, May 1, 1958.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

/s/ Raymond J. Cannon
Clerk

# Appendix C

## The Statute Involved

LOCAL LAW NO. 27, LOCAL LAWS OF 1942

### TITLE RR

GENERAL BUSINESS AND FINANCIAL TAX

§RR41-1.0 *Definitions.* When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

*Appendix C—The Statute Involved*

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations law of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

A broker who initiates, executes or clears a purchase or sales contract in conjunction with another broker may deduct from gross income any commissions paid by him to such other broker.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer." The treasurer of the city.

§RR41-2.0 *Imposition of tax.* a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-three every person shall pay an excise tax which shall be equal to one-twentieth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-one and nineteen hundred forty-two, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-three every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-one and nineteen hundred forty-two, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades,

business, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of any calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year, commencing on a date subsequent to January first of the calendar year in question and not extending

beyond June thirtieth of the year next succeeding such calendar year; and if such person shall not have been so engaged for an entire year prior to June thirtieth of the year next succeeding the calendar year in question, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred forty-one, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

* * *

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(35536)

IN THE

# Supreme Court of the United States

October Term, 1958

**No. 294**

JOHN E. STEINBECK,

*Appellant,*

*against*

LAWRENCE E. GEROSA as Comptrolier of the City of New York, and GEORGE M. BRAGALINI as Treasurer of the City of New York,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## MOTION TO DISMISS APPEAL

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(35536)

IN THE

# Supreme Court of the United States

October Term, 1958

**No. 294**

JOHN E. STEINBECK,

*Appellant,*

*against*

LAWRENCE E. GEROSA as Comptroller of the City of New York, and GEORGE M. BRAGALINI as Treasurer of the City of New York,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## MOTION TO DISMISS APPEAL

### Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York dated May 1, 1958, unanimously affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is officially reported in 4 NY 2d 302 and is set forth in Appendix A of the appellant's statement as to jurisdiction. The decision of the Appellate Division is officially reported in 4 AD 2d 855.

By this appeal, appellant challenges the constitutional validity of the New York City General Business and Financial Tax as applied to him. The tax, by its terms, is applied to any person carrying on within the City of New York

"any trade, business, profession, vocation or commercial activity" so long as the gross receipts therefrom exceed $10,000 per annum. Appellant contends that the freedom of press provision of the First Amendment and the Fourteenth Amendment of the United States Constitution bar the imposition of such a tax on authors.

Appellant also contends that he is engaged in interstate and foreign commerce and that, therefore, Article 1, Section 8, of the United States Constitution bars local taxation of his receipts or, alternatively, requires such taxation to be on an allocated basis.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

## Statutes Involved

The law imposing the tax is set forth in Appendix C of the appellant's statement as to jurisdiction.

## Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul and correct a determination of the Comptroller of the City of New York denying a refund of general business taxes paid for the period between January 12, 1943 and June 30, 1950, during which appellant was concededly a resident of New York City.

The determination under review here was made as the result of a hearing held by the Comptroller of the City of New York at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing and both sides introduced testimony at the hearing.

Under the practice in New York the administrative hearing constitutes the trial of the issues in the case (Civil Practice Act, Article 78). The determination issued in this case as a result of the hearing was first reviewed by the Appellate Division, First Department, which unanimously confirmed it. Upon appeal by appellant to the Court of Appeals of the State of New York that Court unanimously affirmed.

## Facts

### I

Appellant is a famous author of novels, plays, motion picture scripts, magazine articles and other literary works. He was concededly a resident of New York City during the period for which he paid the taxes under review (fols. 103, 118-122). During these periods he wrote numerous novels, motion picture scripts, plays, newspaper and magazine articles, and radio scripts (fols. 166-168, 366, 502-508, Respts. Exh. D). Appellant did research for his writings and checked and edited the proofs of his writings in New York City (fols. 158-159, 255-257, 266, 419). Correspondence with respect to his literary works was received by him in the City (fol. 255). Through his agent, appellant negotiated in New York City for the sale of his rights to his literary works (fols. 199, 347-349). The record shows that during these periods appellant executed contracts in New York City for the sale of his rights to seven motion picture scripts, three books and two plays (fols. 502, 503, 505-507).

### II

Respondents' exhibits D, H and I exemplify the kind of contracts appellant executed in New York City. Those covering books provided that appellant was to be paid a percentage of the amount charged by the publisher for all

copies sold, less copies returned, but with "no deduction for cash discounts or bad debts" [Respts. Exh. D, "A Russian Journal", (par. 4)]. Those covering other works provided either wholly or in part for the payment of a lump sum to appellant (Respts. Exh. D, "Contract for Purchase of Manuscript"; *id.* Option Agreement, "Viva Zapata", par. Fourth; Respts. Exh. H, "Of Mice and Men", par. Thirteenth; fol. 446). All of the contracts purported to sell petitioner's rights in his literary works.

Aside from their use as a measure of the payment for the sale of his rights, appellant had no interest, direct or indirect, in the sale of copies of his books, plays, articles or scripts. He did not control or participate in any way in these transactions of sale which involved only the publishers or producers who had purchased his rights from him (fols. 394, 400-401, 406-412, 432-435).

## III

Since 1932, the New York City firm of McIntosh and Otis, Inc. has been appellant's sole literary agent (fols. 122, 354). McIntosh and Otis, Inc. had complete authority to act on appellant's behalf in all matters relating to and arising out of the contracts for the sale of appellant's rights in his literary works (Respts. Exh. D, "A Russian Journal", par. 14A; *id.*, Option Agreement, "Viva Zapata", par. 4(b); *id.* Contract re "Viva Zapata", par. Thirteenth). The New York City agent received all of appellant's manuscripts, negotiated the sale of appellant's rights thereto and often executed contracts as his attorney-in-fact (fols. 348-349).

In addition, the New York City agent handled all of appellant's business correspondence, kept a file of his contracts and correspondence, received financial statements of receipts earned by appellant, registered his copyrights,

deposited his receipts in a New York City bank account, and recorded and paid his expenses for professional dues, stationery, telephone, telegraph, reference bo[illegible]s, theatre and airline tickets and "cleaning office" (fols. 358-361, 370, 373-374, 376, 378, 380-381, 383, 469-473, 479; Respts. Exh. G. entry of Dec. 30, 1948; Respts. Exh. E).

Appellant's federal income tax returns were prepared by his attorneys from information supplied by McIntosh and Otis, Inc. (fols. 269, 448, 465, 467). These returns treated the receipts taxed herein as "profit from profession" (Respts. Exhs. E and F).

All of these activities by his agent in New York City were best characterized by appellant himself. He referred to McIntosh and Otis, Inc. as "my business associates" (fol. 239). He emphasized that their activities were continuous on his behalf and that they did whatever was "necessary in the business of publishing manuscripts" (fols. 124, 248, 253).

## IV

It should be noted that originally the final determination included receipts from the sale of rights to literary works written prior to the date that appellant became a New York resident. By stipulation of settlement between the parties, the tax attributable to those receipts has been eliminated from this proceeding. This reduced the amount of tax in controversy for the 7½ years involved to $531.09, together with $133.73 interest, making a total of $664.82.

## POINT I

**The claim that the First and Fourteenth Amendments to the United States Constitution bar the application of the New York City General Business and Financial Tax to authors presents no substantial Federal question.**

### I

Appellant is a writer of novels, plays, magazine articles and motion picture scripts. It is contended on his behalf that these activities, from which he earns his entire livelihood, cannot be subjected to a general gross receipts tax without violating the constitutional guarantee of freedom of the press. There is no doubt that the protection of this constitutional provision extends to the petitioner's writings, but the construction which the petitioner seeks has never been applied to the business of publishing a newspaper which more essentially involves freedom of the press than does the writing of novels.

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. *In re Jager,* 29 S. C. 438, 7 S. E. 605, 609 (1888); *Preston* v. *Finley,* 72 Fed. 850 (Cir. Ct., Tex., 1896); *City of Norfolk* v. *Norfolk Landmark Pub. Co.,* 95 Va. 564, 28 S. E. 959 (1898); *Giragi* v. *Moore,* 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), *app. dism. for want of substantial federal qn.* 301 U. S. 670 (1937); *Arizona Pub. Co.* v. *O'Neil,* 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U. S. 543 (1938); *Tampa Times Co.* v. *City of Tampa,* 158 Fla. 589, 29 So. 2d 368 (1947), *app. dism. for want of a substantial federal qn.* 332 U. S. 749 (1947); *City of Corona* v. *Corona Daily Independent,* 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), *cert. den.* 346 U. S. 833 (1953); *Alaska* v. *Journal Printing Company,* 135 F. Supp. 169 (D. Ct., Alaska, 1955).

These cases furnish a complete answer to the appellant's contention. In at least three of these cases this Court passed upon the constitutional issue and upheld the tax. These three cases— the *Giragi* case, the *Arizona Pub. Co.* case and the *Tampa Times Co.* case—all involved privilege taxes measured by gross receipts. Thus, they are squarely in point.

It is clear from these cases that the freedom of the press guarantee was not intended to exempt writers or publishers of newspapers, magazines or novels from ordinary revenue measures for the support of the government.

While the three cases in which this Court upheld privilege taxes dispose of the petitioner's argument that a privilege tax may not be imposed on him, we wish to note briefly that petitioner's analogy to privilege taxes under the Commerce Clause is unsound. The free press guarantee limits both the federal government and the states in exactly the same way. The Commerce Clause restriction applies to the states alone, and it rests on the fact that the power to regulate commerce among the states has been granted to the federal government. The Commerce Clause cases merely hold that the states cannot tax the privilege of engaging in interstate commerce because, as stated in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), at page 608:

> "They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce * * *."

## II

The case of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), illustrates the kind of tax on the press which is constitutionally objectionable. In the *Grosjean* case, the Court struck down a gross receipts tax which was imposed solely on newspapers having a large circulation. It was

shown that the real objective of the tax was to suppress newspapers hostile to the incumbent administration.

The Court made it plain that it was not holding that there is a bar against taxing newspapers, saying (p. 250):

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of government."

The opinion went on to explain that the tax was being struck down because it was a deliberate device to limit the circulation of information (pp. 250-251).

The clarity with which the Court explained the basis of its determination leaves no ground for the suggestion that an ordinary gross receipts tax may not be applied to the press. Any doubts which might have arisen were completely dispelled by subsequent cases in which this Court upheld such taxes or, in effect, upheld them by dismissing on the ground that no substantial federal question was involved. *Giragi* v. *Moore*, 301 U. S. 670 (1937); *Arizona Pub. Co.* v. *O'Neil*, 304 U. S. 543 (1938); *Tampa Times Co.* v. *City of Tampa*, 332 U. S. 749 (1947). See also, *City of Corona* v. *Corona Daily Independent*, 346 U. S. 833 (1953). See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 194 (1946).

The tax involved in the case at bar applies, not only to writers and publishers, but to all businesses, professions, trades, vocations and commercial activities. It is measured by gross receipts and applies to all without discrimination. Thus, it is a general tax and one which is not, in any sense, aimed at the press or at writers.

## III

Appellant finds some superficial support in a few statements made in the majority opinions in several Jehovah's Witnesses' cases decided on a 5-4 basis. *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943). All of these cases involved flat license taxes which were applied by municipalities to members of the sect who, in the course of propagating their religion, sold religious tracts and books or, at times, gave them away. The applications of the taxes under these circumstances were held to be unconstitutional as violative of the First and Fourteenth Amendments.

Although the emphasis in these opinions is upon freedom of religion, there is also discussion of principles applicable to all First Amendment freedoms. In essence these come down to statements that a tax may not be laid specifically upon these freedoms; that a charge may not be made for the enjoyment of a right granted by the federal constitution; that a flat license tax applied to rights guaranteed by the First Amendment would have destructive effect; and that the power to tax the exercise of a privilege is the power to suppress or control its enjoyment.

These statements, when read out of context, give surface support to the appellant's contention. It must be remembered, however, that they were uttered with regard to a flat license tax on the right of itinerant preachers to distribute religious literature for which a small charge usually was made. And the opinions emphasize the prior restraint.

Moreover, at least one of these opinions cited, without criticism, the *Giragi* case which had upheld a privilege tax upon newspapers measured by its gross receipts [see Justice MURPHY's dissent in *Jones* v. *Opelika*, 316 U. S. 584,

619 (1942), which became a majority opinion in *Jones* v. *Opelika*, 319 U. S. 103 (1943)].

In addition, the opinions emphasized the non-commercial nature of the activities involved in the cases before the Court. In *Jones* v. *Opelika*, 316 U. S. 584, Mr. Justice MURPHY pointed out that (p. 619):

> "Petitioners were not engaged in a traffic for profit."

He later said that the limitations stated with regard to taxes on freedom of speech and freedom of the press applied where there was "no thought of commercial gain" (p. 621). See, also, Chief Justice STONE's opinion in the same case (316 U. S., at p. 604); *Murdock* v. *Pennsylvania*, 319 U. S., at p. 111. *Cf. Follett* v. *McCormick*, 321 U. S., at p. 576.

Any uncertainty concerning the scope of the decisions in these Jehovah's Witnesses' cases was soon clarified. In *Tampa Times Co.* v. *City of Tampa*, 332 U. S. 749 (1947), this Court refused to review a determination which upheld a privilege tax, measured by gross receipts, on the ground that no substantial federal question was involved.

In *Breard* v. *City of Alexandria*, 341 U. S. 622 (1951), an ordinance forbidding peddlers and canvassers from calling upon occupants of private residences was held valid as to canvassers for magazine subscriptions. The Court said (p. 642):

> "We agree that the fact that the periodicals are sold does not put them beyond the First Amendment. The selling, however, brings into the transaction a commercial feature."

Mr. Justices BLACK and DOUGLAS dissented, and asserted that the Jehovah's Witnesses' cases were being overruled.

Thereafter, in *City of Corona* v. *Corona Daily Independent*, 346 U. S. 833 (1953), certiorari was denied although the State court had upheld a flat license tax as applied to a newspaper (115 Cal. App. 2d 382, 252 P. 2d 56). Justices BLACK and DOUGLAS dissented from the denial of certiorari, emphasizing that the tax was the flat license type. It seems clear that a privilege tax measured by gross receipts does not violate the freedom of the press guarantee. Certainly, in light of the cases, it is evident that such a tax may be imposed upon an author who earns his livelihood from his writings. The fact that appellant is an eminently gifted writer does not make his activities non-commercial. In fact, the quality of his work enhances his earnings.

Appellant insists that the *Tampa Times* and *City of Corona* cases did not involve taxes which were privilege taxes "in substance as well as in form" (Jurisdictional Statement, p. 11). There is, however, not the slightest basis for suggesting that the tax in the case at bar is any more a privilege tax in substance than the taxes in those cases. It also, to use the words of the California court in the *Corona* case, "does not grant or take away any right to do business, does not subject business to withdrawal or control by the city, is not regulatory in any manner."

After noting this resemblance between the two taxes, the New York Court of Appeals characterized the tax here in issue as follows (4 NY 2d, at p. 315):

> "Its sole object is revenue notwithstanding the fact that the tax is styled a 'privilege tax.'"

## POINT II

**The claim that Article I, Section 8, of the United States Constitution requires an allocation of the tax imposed on appellant presents no substantial Federal question.**

### I

While appellant contends that Article I, Section 8, of the United States Constitution bars the imposition upon him of the tax under review, the only argument he advances is in support of a contention that such a tax must be allocated.

As the Court of Appeals of New York pointed out, appellant himself is not engaged in interstate or foreign commerce (4 NY 2d, at pp. 316-318). His literary works were sold and performed in other states and in foreign countries, but such sales and productions were made by his publisher and licensees of his publisher. Appellant had no property rights in the books or magazines sold by the publishers, nor in the films made by motion picture companies. The fact that the consideration paid to him was, at times, based on a percentage of his publisher's receipts did not make appellant a joint adventurer with the publisher. As the Court of Appeals said (4 NY 2d, at pp. 317-318):

> "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses* * * *. An agreement to distribute the proceeds of an enterprise upon a percentage basis does not represent a joinder of property, skills and risks * * *.
>
> * * * * *

The sums payable to petitioner by way of royalties were merely the price for the licensing of certain of his literary rights. The sales made by the publishers and the gross receipts from the motion pictures were simply the means by which the price for the licensing of Mr. Steinbeck's literary rights were ultimately to be determined. The relationship between an author and a publisher is not that of joint venturers merely because the publisher is to pay the author on the basis of receipts from the sale of books. On the contrary, it must be said that the *source* of Mr. Steinbeck's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City (see *Ingram* v. *Bowers*, 57 F. 2d 65)." (Italics the Court's.)

## II

In support of his Commerce Clause argument, the appellant cites two cases (Jurisdictional Statement, p. 16). Both of the cases involved stevedoring and in one of these cases this Court pointed out that the business of loading and unloading vessels moving in interstate or foreign commerce is "essentially a part of the commerce itself." *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 433 (1947). This immunity from local taxation does not apply, however, simply because a local business or occupation contemplates that foreign commerce will ensue or is related to foreign commerce or is even necessary to foreign commerce. *Nathan* v. *Louisiana*, 49 U. S. 73 (1850) (brokers in foreign exchange); *Puget Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, 94 (1937) (business of furnishing stevedores for hire); *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951) (renting of cranes to unload vessels); *Western Maryland R. Co.* v. *Rogan*, 340 U. S. 520 (1951) (transportation of exports and imports to and from a port).

## CONCLUSION

**The appeal to this Court from the order of the Court of Appeals of the State of New York should be dismissed.**

September 2, 1958.

Respectfully submitted,

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IN THE

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**October Term, 1958**

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**No. 294**

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JOHN E. STEINBECK,

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—against—

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*Appellees.*

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## APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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IN THE

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## APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

---

## POINT I

### The Question Presented Under The First and Fourteenth Amendments Is Substantial.

Appellees, in the Motion to Dismiss, rely mainly on decisions involving taxation of newspaper publishers (Motion, p. 6); and on an effort to explain away the analogous immunity of Interstate Commerce from privilege taxation.

## I

The implications of the issue—whether *Follett* v. *McCormick* (321 U. S. 573) and *Murdock* v. *Pennsylvania* (319 U. S. 105) preclude a "literal" privilege tax on First Amendment privileges; whether the principles which invalidate the same tax on interstate commerce also protect First Amendment privileges; and whether a state may impose a "literal" privilege tax on authors—were neither posed nor resolved in the newspaper tax cases cited by Appellees.

These decisions are scarcely conclusive in determining whether *Follett* and *Murdock* condemn a tax imposed directly on the exercise of Free Press privileges or are limited to "itinerant preachers". Most* antedated *Follet* and *Murdock* (as well as *Freeman* v. *Hewitt*, 329 U. S. 249, *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, and *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602).

In the two subsequent appellate decisions (*Tampa Times Co.* v. *City of Tampa*, 332 U. S. 749; *City of Corona* v. *Corona Daily Independent*, 346 U. S. 833), the state courts carefully explained that the tax was not actually a privilege tax. (Similarly, in *Arizona Pub. Co.* v. *O'Neil*, 22 F. Supp. 117, 118, the Court observed: "It is, in effect, a general sales tax." Aff'd. 304 U. S. 543.)

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* *In re Jager*, 29 S. C. 438, 7 S. E. 605, 609 (1888); *Preston* v. *Finley*, 72 Fed. 850 (Cir. Ct., Tex., 1896); *City of Norfolk* v. *Norfolk Landmark Pub. Co.*, 95 Va. 564, 28 S. E. 959 (1898); *Giragi* v. *Moore*, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dism. for want of substantial federal qn. 301 U. S. 670 (1937); *Arizona Pub. Co.* v. *O'Neil*, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U. S. 543 (1938).

## II

None of the newspaper decisions involved a tax which—as here—had been precisely construed by State decision to be a "literal" privilege tax, specifically declared not to be some other tax in disguise, and solely for these reasons held constitutionally inapplicable to interstate commerce (*Joseph* v. *Carter & Weekes Co., supra; United Airlines* v. *Joseph*, 282 App. Div. 48, 121 N. Y. S. (2d) 692; aff'd. 307 N. Y. 762; 121 N. E. 2d 557. Cf. *Spector Motor Service* v. *O'Connor, supra*).

These factors emphasize another substantial dimension of the question presented. Are the principles and rationale of these interstate commerce decisions applicable with equal force in the area of the First Amendment? That they are is indicated in *Murdock* v. *Pennsylvania, supra,* where the Court noted:

> "• • • A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus it may not exact a license tax for the privilege of carrying on interstate commerce. (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56-58) • • •." (319 U. S. p. 113)

Appellees beg the question by suggesting that Interstate Commerce is immune from privilege taxation "merely" because the States had previously "delegated" to the Federal Government their power to tax it.

This simply reiterates the conclusion of these decisions that the states may not tax the privilege of engaging in Interstate Commerce. What is significant is the process of interpretation which lead to this conclusion.

The Constitution itself contains no express limitation on the states' power to tax persons or activities, nor any "delegation" of that power. Limitations on the taxation of interstate commerce, "spring from applications to state tax situations of general clauses of the Constitution * * *" and from

> "long continued judicial interpretation that, without congressional action, the words themselves of the commerce clause forbid undue interference by the states with interstate commerce * * *."

(*Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 426-427).

Indeed, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, 430, Chief Justice Marshall emphatically rejected the argument that the states had ever possessed, no less delegated, the power of taxtion there contended for ("the right never existed and the question whether it has been surrendered, cannot arise."); and placed the decision squarely on the ground that rights and powers granted by the Constitution were supreme and could not, therefore, be subjected to any impairment by the States (Id. 431-433).

In the interstate commerce decisions relied on by Appellant (Jurisdictional Statement, pp. 12-16), this Court stated the reasons why privilege (and similar) taxes are an actual or potential interference with Interstate Commerce, and for these reasons it held such taxes unconstitutional *per se* when applied as that Constitutional privilege. As urged in the Jurisdictional Statement, a substantial question is presented as to whether the principles declared in those decisions impel the same conclusion with respect to the equivalent Constitutional Privilege of Free Press.

In seeking to mitigate the precise definition of the New York Gross Receipts Tax—made in *United Airlines* v. *Joseph, supra,* and not disavowed by the Court of Appeals —Appellees note that the "sole object" of this tax is revenue. However, revenue was also its sole object in *Joseph* v. *Carter & Weekes Co.* and *United Airlines* v. *Joseph, supra* (as it was the sole object of the taxes in *Spector Motor Service* v. *O'Connor* and *Freeman* v. *Hewitt, supra*).

## III

None of the newspaper cases, relied on by Appellees, concerned a direct tax on the privilege of being an author. The decision below is the first involving a tax on the bedrock of free press—the privilege of writing, and licensing the publication of what is written.

Thus, the question is posed sharply here, as it was not in the newspaper decisions, because Appellant did not employ a large staff (he had no employees); nor did he maintain a substantial plant, equipment or business organization (his only equipment was a yellow pad and pencil, Trans. p. 210); nor did he simultaneously exercise privileges beyond the ambit of the First Amendment, such as selling of advertising.

Appellant did not engage in any activity which was not essential to writing and to bringing what he had written to the public. After a book or play was completed, he entered into a contract providing for its publication or performance. In most of these agreements (two motion picture contracts being the only exception), he retained the copyrights and all rights other than the one being licensed;

contracts for plays licensed only the right of "first class" performance—on a royalty basis; contracts for books, licensed only the right of publication—on a royalty basis. Each license terminates when the producer ceases to present a play, or the publisher fails to keep a book in print (Jurisdictional Statement 2a, Transcript B 36, 37, 59-63).

Appellees are in error when they characterize these transactions as "sales" of rights. But more important, it is by virtue of these contracts (whether involving licenses or "sales" of rights) that an author's work reaches the public; and the making of such agreements is as essential an element of "Free Press," as is creation of the work, or its publication.

## CONCLUSION

**It is respectfully submitted that Appellees' motion to dismiss this appeal should be denied.**

Respectfully submitted,

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